IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

JOHN McCLELLAND & ASSOCIATES, INC.,	)	
Plaintiff,	)	**CIVIL ACTION**
v.	)	**No. 04-2545-CM**
MEDICAL ACTION INDUSTRIES, INC.,	)	
Defendant.	)	

MEMORANDUM AND ORDER

Plaintiff John McClelland & Associates, Inc., a former independent sales representative for defendant Medical Action Industries, Inc., brings this action for breach of oral contract, unjust enrichment, and quantum meruit. This matter is before the court on plaintiff's Motion to Deem Admitted Certain Requests for Admission (Doc. 42).

I. LEGAL STANDARD

Federal Rule of Civil Procedure 36 governs requests for admission and, in relevant part, states as follows:

> The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. . . . [W]hen good faith requires that a party qualify an answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny.

Fed. R. Civ. P. 36(a). "The request, 'except in a most unusual circumstance, should be such that it [can] be answered yes, no, the answerer does not know, or a very simple direct explanation given as to why he cannot answer, such as in the case of "privilege."'" *Doebele v. Sprint Corp.* No. 00-2053-KHV, 2001 WL 1718259, at * 2 (D. Kan. June 05, 2001) (quoting *Johnstone v. Cronlund*, 25 F.R.D. 42 (E.D. Pa. 1960)). If an answer does not comply with Rule 36, the request may be deemed admitted. Fed. R. Civ. P. 36(a).

Before filing a motion under Rule 36, however, the moving party must confer or make reasonable effort to confer with opposing counsel. D. Kan. Rule 37.2. Reasonable effort to confer "requires that the parties in good faith converse, confer, compare views, consult and deliberate, or in good faith attempt to do so." *Id.* The parties "must make genuine efforts to resolve the dispute by determining precisely what the requesting party is actually seeking; what responsive documents or information the discovering party is reasonably capable of producing; and what specific, genuine objections or other issues, if any, cannot be resolved without judicial intervention." *Cotracom Commodity Trading Co. v. Seaboard Corp.*, 189 F.R.D. 456, 459 (D. Kan. 1999). The court may deny a motion to determine the sufficiency of answers to requests for admissions if the movant fails to meet and confer with opposing counsel in good faith. *City of Wichita v. Aero Holdings, Inc.*, No. 98-1360-MLB, 2000 WL 33170895, at *4 (D. Kan. Oct. 23, 2000) (denying a Rule 36(a) motion because the moving party did not confer in good faith with opposing counsel).

II. DISCUSSION

A. Requests for Admission Nos. 2, 7, 8, and 26-28

In its motion, plaintiff asks the court to deem admitted requests numbers 2, 7, 8, and 26-28.

Request for Admission No. 2 asks defendant to admit or deny that "[plaintiff] was terminated as an independent sales representative for [defendant] effective April 30, 2004." Instead of responding to the question asked, defendant stated, among other non-responsive statements, that plaintiff "was paid commissions through April 30, 2004" without addressing the effective date of the termination. In its memorandum in opposition to this motion, defendant explained why it could not determine the effective date of plaintiff's termination. Defendant had the information to provide plaintiff with this explanation when defendant originally answered the requests. Under Rule 36, defendant was required to qualify its original response to the request:

> when good faith requires that a party qualify an answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder.

Fed. R. Civ. P. 36(a). But, instead, defendant provided extraneous information to avoid the question. Defendant's response is inconsistent with its obligations under Rule 36.

Request numbers 7 and 8 seek admissions that, within its sales territory, plaintiff increased (1) the number of defendant's customers and (2) the gross revenue realized by defendant. Defendant again failed to respond to the question asked. Defendant contends its response was appropriate because defendant obtained some of the customers in plaintiff's sales territory without plaintiff's assistance and because the customer and sales numbers fluctuated during the time plaintiff worked for defendant. This excuse does not explain defendant's failure to comply with Rule 36, which requires defendant to admit or deny the request or state that it made a reasonable inquiry to determine the facts. *See* Fed. R. Civ. P. 36(a).

Request numbers 26 and 27 ask defendant to admit or deny specific terms of its sales compensation plans – that the plans were effective for a 12-month period and were not automatically

renewable. In its non-responsive answer, defendant states that the commission plans were implemented on a fiscal-year cycle and remained virtually unchanged from year to year. Defendant argues that it cannot admit or deny these requests because plaintiff did not specify which fiscal year the requests reference and because only three commission plans were produced during discovery. This reasoning does not explain defendant's non-responsive answer. Defendant's response does not comply with Rule 36.

In request number 28, plaintiff asks defendant to admit or deny that at the time of plaintiff's termination, April 2004, plaintiff was entitled to a 5% commission on its sales. Without admitting or denying the request, defendant stated that plaintiff was entitled to a 4% commission. Defendant did not admit or deny the request because at the time of the termination, defendant had not calculated plaintiff's 2005 fiscal-year commission percentage. The commission percentage is usually computed a few months into the fiscal year; plaintiff was terminated one month into the 2005 fiscal year. But Rule 36 specifically rejects the response "lack of knowledge" and requires a "reasonable inquiry." Fed. R. Civ. P. 36. Defendant may not have known the answer to this request when it terminated plaintiff in April 2004, but the information should have been available in August 2005, when defendant served its responses to plaintiff's requests for admission. Defendant was obligated to make a reasonable inquiry to determine the answer to the request. It appears from the record that defendant failed to do so.

Although defendant blames the inadequacy of its responses on the "ambiguous and difficult phraseology" of plaintiff's requests, the court finds that plaintiff's requests are simple and direct and that defendant failed to comply with Fed. R. Civ. P. 36 when responding to these requests for admission.

B. Failure to Meet and Confer

Plaintiff failed to follow this court's rules – specifically D. Kan. Rule 37.2 – by neglecting to meet and confer with opposing counsel prior to filing this motion. Plaintiff's failure deprived defendant of the opportunity to amend or clarify its responses. Although the court may deny plaintiff's motion for its failure to comply with court rules, the court declines to do so at this stage of the proceedings and instructs defendant to serve amended responses that comply with the Federal Rules of Civil Procedure. The court reserves ruling on plaintiff's motion to deem the requests admitted until after reviewing defendant's supplemental responses. The court further directs counsel for both parties to consult all applicable rules and court guidelines in the future.

IT IS THEREFORE ORDERED that plaintiff's Motion to Deem Admitted Certain Requests for Admission (Doc. 42) is taken under advisement.

IT IS FURTHER ORDERED that defendant shall serve and file with the court amended responses to plaintiff's Requests for Admissions Nos. 2, 7, 8, and 26-28 by July 19, 2006.

Dated this 12th day of July 2006, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge